

No. 8847

United States
Circuit Court of Appeals

For the Ninth Circuit //

JOAN STORM DEZENDORF,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

REPLY BRIEF FOR APPELLANT

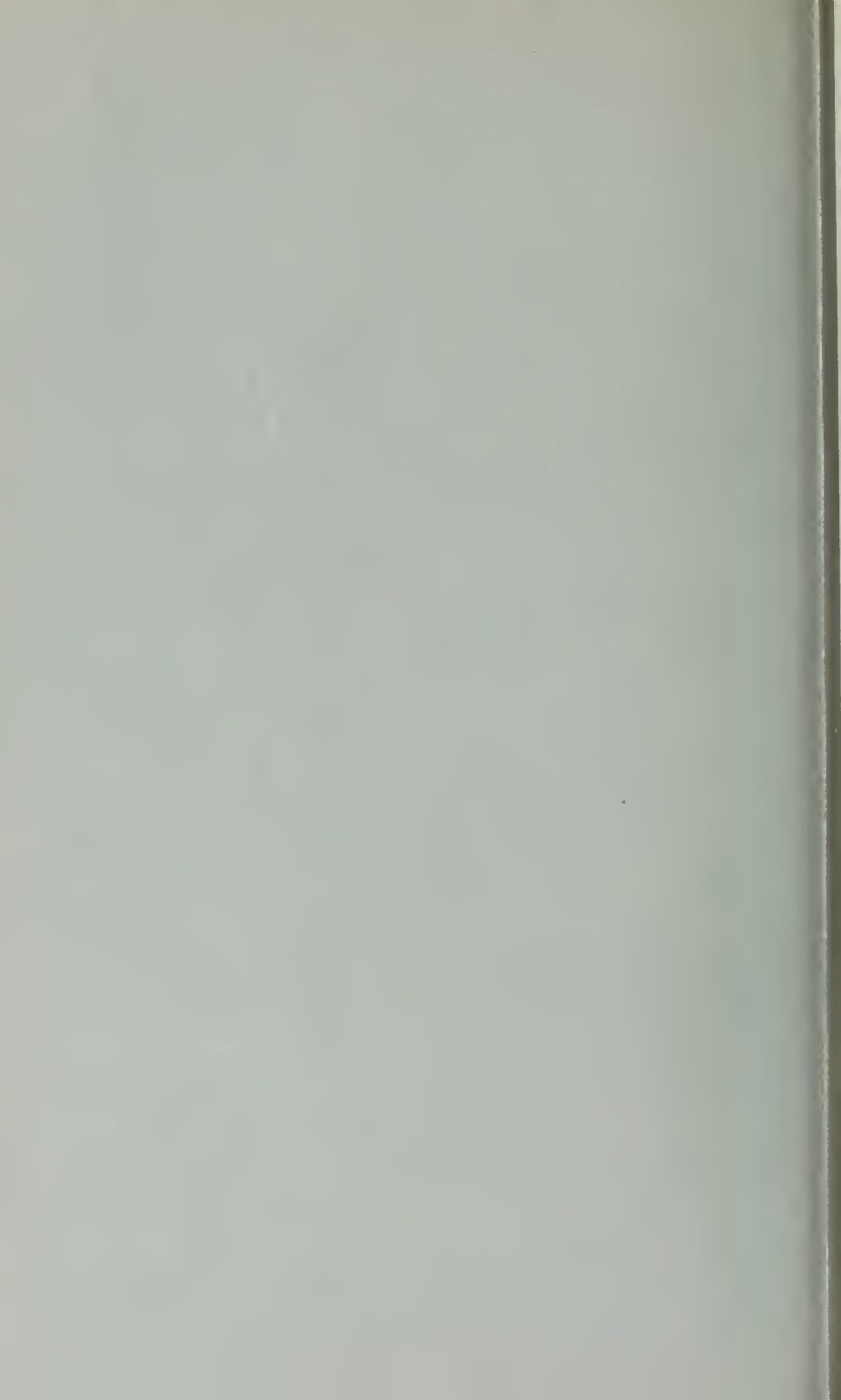
JAS. M. NAYLOR,

I. HENRY HARRIS, JR.,

CALVIN L. HELGOE,

Russ Building,
San Francisco, California

Attorneys for Appellant.



Subject Index

	Page
Question of Originality Not Before the Court.....	1
References to Originality or Novelty of Appellant's Play in Appellee's Brief Should be Ignored and Stricken.....	5
Appellee Admits Infringement of Substantial Portions of Appellant's Play	7
Conclusion	8

Table of Cases Cited

	Pages
Bronk v. Chas. H. Scott Co., 211 Fed. 338 (C. C. A. 7).....	3
Caesar v. Joseph Pernick Co., Inc., 1 Fed. Sup. p. 290.....	3, 5
I. T. S. Rubber Co. v. Essex Rubber Co., 281 Fed. 5 (C. C. A. 1).....	3
Sheldon, et al. v. Metro-Goldwyn Pictures Corporation, et al., 81 Fed.(2d) 49 (C. C. A. 2).....	7
Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. Rep. 220, 221	2



United States
Circuit Court of Appeals
For the Ninth Circuit

JOAN STORM DEZENDORF,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPO-
RATION, a corporation,

Appellee.

REPLY BRIEF FOR APPELLANT

QUESTION OF ORIGINALITY NOT BEFORE THE COURT

It was unequivocally argued in appellant's opening brief (pp. 9 and 10) that the originality of her play was admitted by the appellee in the filing of its motion to dismiss. The appellee contends (brief pp. 5-7) that this is not true but on the contrary:

"The question of originality, in the sense of novelty of treatment, entitling the author to the protection of the common law or of the copyright statute is just as definitely before the court for determination as is the question of infringement."

The appellee takes the position that while the motion to dismiss admits the truth of the facts well pleaded in the

complaint (except those facts or allegations which are superseded by the amendment incorporating the two works into the bill), originality is not one of the facts in the class admitted.

The disingeniousness of this line of reasoning is believed quite apparent when consideration is given the fact that appellee treats the allegations as to appellant's authorship and ownership of the play and appellee's access thereto as having been admitted for the purposes of the motion (appellee's brief pp. 3-5). There is no valid distinction between allegations as to authorship, originality, ownership and access in so far as the effect of a motion to dismiss is concerned.

The question of originality in a copyright suit is one of fact and it is a material fact. It can only be properly tested by comparison with prior works properly pleaded and proved, subject to cross-examination, as distinguished from counsels' vague reference in appellee's brief to what is or is not in that vast and nebulous field known as the public domain. Being a fact well pleaded in the bill of complaint originality must be deemed admitted by the motion to dismiss. See

Stromberg Motor Devices Co. v. Holley Bros. Co.,
260 Fed. Rep. 220, 221:

"It is elementary that on such a motion the allegation of material facts which are well pleaded in the bill must be accepted as true for the purposes of the motion, and that only defenses in point of law arising upon the face of the bill may be raised in this manner.

(Citing *Tompkins v. International Paper Co.*, 183 Fed. Rep. 773, 106 CCA 529; *Krouse v. Brevard Tan-*

ning Co., 249 Fed. Rep. 538, 161 CCA 464; *Edwards v. Bodkin*, 249 Fed. Rep. 562, 161 (CCA 488)).” (Emphasis supplied.)

Caesar v. Joseph Pernick Co., Inc., 1 Fed. Sup. p. 290 (cited at page 10 of appellant’s opening brief) involved a motion to dismiss the bill of complaint and for an order and decree to such effect on the ground that neither of the claims of the patent referred to in the bill of complaint was infringed by either of the devices illustrated as Exhibits A and B of the defendant’s interrogatories. The court had this to say (p. 291):

“By this motion under Rule 29 of the Equity Rules (28 USCA §723), which is the substitute for the old demurrer, the defendant admits, for the purposes of this motion, the validity of the patent in suit, and the only question is infringement.” (Emphasis supplied.)

I. T. S. Rubber Co. v. Essex Rubber Co., 281 Fed. 5 (C. C. A. 1).

In considering the defendant’s motion to dismiss a bill of complaint for patent infringement, the court said (p. 6):

“For the purpose of determining the question raised by the motion, the defendant concedes that the patent is valid, and that there is nothing in the prior art, except as stated in the patent itself, and nothing in the file wrapper which should limit the plain terms of the patent.” (Emphasis supplied.)

Bronk v. Chas. H. Scott Co., 211 Fed. 338 (C. C. A. 7):

“If the decree cannot be sustained by an application of the law to the fact admitted by appellant in

her bill and in her answers to appellee's interrogatories, the cause must be remanded for trial in due course. **Undoubtedly the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts; but when the facts are not admitted neither that rule nor any other warrants a summary disposition on affidavits or other untested showings by the party moving for the summary disposition, in lieu of proofs duly taken with proper opportunity for the adversary to cross-examine. We therefore disregard the file-wrapper and the patents tendered by appellee, and consider only those facts which stood admitted by appellant upon the record prior to appellee's motion for a decree of dismissal!**

* * * * *

“If a bill in and by its own averments, states a prima facie case, that case cannot properly be overturned by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill. **This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on a demurrer to the bill.**” (Emphasis supplied.)

Clearly, the motion to dismiss in the present case raised only the specific question of infringement, a fact to be determined from the face of the amended bill of complaint, with play and picture annexed, by known rules of law.

It is significant to note that appellee offers no reply to appellant's argument (appellant's opening brief, pp. 9-10) that a motion to dismiss in a copyright suit admits originality like a similar motion admits validity of a patent (citing *Caesar v. Jos. Pernick Co. Inc.*, supra). No one would have the temerity to discuss prior art and its relation to the patent in suit where only the issue of infringement was raised by a motion to dismiss and no valid distinction is seen between the two types of cases. If the appellee desired to test the fact of originality there was an available procedure, i. e., let the case go to trial and offer proper proof of prior third party works.

We do not understand any of the authorities cited in appellee's brief on the question of originality as going so far as to permit counsel or the court to rely on untested showings or vague references to prior works.

REFERENCES TO ORIGINALITY OR NOVELTY OF APPELLANT'S PLAY IN APPELLEE'S BRIEF SHOULD BE IGNORED AND STRICKEN.

It having been demonstrated that originality of appellant's play has been admitted, there is no room in the argument of the present case for appellee's vague and unsupported references to alleged "prior art" or material in the public domain.

The principal question presented for determination on this appeal is whether the appellee's motion picture infringes appellant's play. While it is appreciated that an appeal in this court is regarded as a proceeding *de novo*,

it must be remembered that the only record before the court consists of a bill of complaint, amended by annexation of appellant's play and appellee's picture, and a motion to dismiss, and therefore there is no evidence properly before the court concerning the question of originality in any of its phases.

Appellee cannot escape the logical effect of the analogy drawn between the case at bar and a suit for patent infringement wherein the naked issue of infringement is raised by a motion to dismiss the bill of complaint. There would be a decided lack of reason if the defendant in the patent case, before the court on motion to dismiss, could question validity, anticipation or the like by vague reference in its brief to prior public uses and prior patents or in other words make an informal reference to prior art which had not been subject to proof or cross-examination. It is obvious that a court would and should not countenance such procedure. No valid distinction can be seen between that situation and the present so far as appellee may seek to question the originality of appellant's play. The law and the rules of court have provided a definite and orderly procedure for raising the defense of lack of originality of copyright or invalidity of a patent. It is based upon pleading and proof. Any other system would lead to pandemonium. Neither court nor counsel would know where to begin nor what the ending would be.

We submit therefore that any and all reference in the appellee's brief to lack of originality or novelty should consequently be ignored and stricken to the end that the issue of infringement may not be rendered obscure.

APPELLEE ADMITS INFRINGEMENT OF SUBSTANTIAL PORTIONS OF APPELLANT'S PLAY.

While we dispute its completeness, for the reasons set forth in our opening brief, it is submitted that the list of similarities between appellee's brief (pp. 8-9) constitute an admission of infringement. Where authorship, originality, ownership and access are admitted, as they were for the purpose of the appellee's motion to dismiss, it is clear that the appellee's own outline shows that it went too far in copying matter from appellant's play as to series of events, episodes, technique, dramatic situations, dramatic plot, treatment, embellishment and detail. It is not enough for the appellee to contend that this or that portion of its picture was borrowed from antiquity or a similar nebulous source since the question of originality is not before the court.

In support of her contention that the record shows that the appellee in making its picture infringed her play, appellant relies upon and again refers to the decision in *Sheldon, et al. v. Metro-Goldwyn Pictures Corporation, et al.*, 81 Fed.(2d) 49 (C. C. A. 2) (cited at p. 16 of appellant's opening brief).

CONCLUSION

We have shown that the only question before the court in this appeal is whether the appellee's picture infringes appellant's play. The questions of authorship, originality, ownership and access are deemed admitted for the purpose of the appellee's motion to dismiss. It is equally clear that appellee copied portions of appellant's play and produced a picture which infringed appellant's common law copyright.

Reversal of the judgment of the District Court is believed in order and accordingly prayed.

Dated: July 30, 1938.

San Francisco, California.

Respectfully submitted,

JAS. M. NAYLOR,

I. HENRY HARRIS, JR.,

CALVIN L. HELGOE,

Attorneys for Appellant.